Supreme Court, U.S.
FILED
OCT 11 1996

(4)

No. 96-146

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES R. KING, APPELLANT

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO VACATE AND REMAND

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26 pp

QUESTION PRESENTED

Whether the district court correctly held that District Four in Illinois' congressional redistricting plan does not violate the Equal Protection Clause.

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Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be vacated and the case remanded for further proceedings in light of this Court's decisions in *Bush* v. *Vera*, 116 S. Ct. 1941 (1996), and *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996).

OPINION BELOW

The opinion of the district court (J.S. App. 5-71) is unreported.

JURISDICTION

The judgment of the district court was entered on March 13, 1996. A notice of appeal (J.S. App. 1-2) was filed on March 22, 1996. On May 16, 1996, Justice

Stevens extended the time for filing a jurisdictional statement until July 20, 1996 (a Saturday), and the appeal was docketed on July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

This case involves a constitutional challenge to the configuration of District Four in Illinois's 1991 congressional districting plan. That plan was drawn by a three-judge federal district court after the state legislature failed to redistrict following the 1990 census. *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court). District Four is located in the City of Chicago and parts of suburban Cook County. It contains a 59% Hispanic voting-age majority. The *Hastert* court believed that a district with such a Hispanic voting-age majority was necessary to forestall a violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 and provide Hispanic voters with a meaningful opportunity to elect the candidates of their choice. This appeal involves the subsequent decision of a different three-judge district court (containing two of the three judges who sat on the earlier three-judge court), which upheld the configuration of District Four against constitutional challenge.

1.a. The Elections Clause of the United States Constitution, Art. I, § 4, vests in state legislatures the initial responsibility for drawing congressional districts. In this century, however, the Illinois legislature has rarely exercised that responsibility. See *Colegrove* v. *Green*, 328 U.S. 549 (1946) (litigation arising from Illinois's failure to redistrict between 1901 and 1945). Since this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), which applied the

one-person/one-vote standard to congressional districting, the State's legislature has never enacted a congressional redistricting plan. Illinois's 1961 plan—the last plan formally enacted by the legislature—was declared invalid by the Supreme Court of Illinois in 1965. *People ex rel. Scott* v. *Kerner*, 208 N.E.2d 561, 566 (Ill. 1965). The legislature failed to enact a new plan, and the court was required to draw one instead. *People ex rel. Scott* v. *Kerner*, 211 N.E.2d 736 (Ill. 1965); see *Kirby* v. *Illinois State Electoral Bd.*, 251 F. Supp. 908 (1965) (three-judge court); see also *Scott* v. *Germano*, 381 U.S. 407 (1965) (contemporaneous litigation involving Illinois legislature's failure to draw new state House and Senate districts). The legislature again failed to redistrict following the 1970 and 1980 censuses; in both instances, three-judge federal district courts devised the State's congressional districts. See *In re Illinois Congressional Reapportionment Cases*, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981) (three-judge court), summarily aff'd *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982); *Skolnick* v. *State Electoral Bd.*, 336 F. Supp. 839, 871 (N.D. Ill. 1971) (three-judge court).

b. Following the 1990 census, the Illinois legislature again abdicated its responsibility. The census reported that Illinois's rate of population growth was smaller than that of the United States as a whole; as a result, the State was apportioned only 20 seats in Congress, down from 22 in the previous decade. J.S. App. 20. Under Illinois law, the State's General Assembly was "charged with the obligation of implementing a constitutionally sound congressional redistricting plan by June 30, 1991." *Hastert*, 777 F. Supp. at 638. But the legislature "did not bring any

redistricting proposal to the floor for debate, much less a vote." *Ibid.*

In light of the legislature's failure to act, five sets of plaintiffs filed suit in the United States District Court for the Northern District of Illinois. J.S. App. 21.[1] Pursuant to 28 U.S.C. 2284(a), a three-judge district court was convened to hear those suits, which were consolidated as *Hastert* v. *State Bd. of Elections*. *Hastert*, 777 F. Supp. at 638-639. Each set of plaintiffs sought a declaration that the State's existing congressional districting plan was unconstitutional in light of the 1990 census results; they also sought an order directing the State to hold elections under a court-drawn redistricting map. J.S. App. 21. In addition, the Nieves plaintiffs also contended that demographic and population changes since 1980 now required the drawing of an Hispanic-majority district pursuant to Section 2. *Hastert*, 777 F. Supp. at 638. The court granted the Illinois State Board of Elections leave to participate as a nominal defendant, which would be bound by the judgment but would neither put on a defense to liability nor participate in remedial proceedings. *Id.* at 639.

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[1] Plaintiffs were the Republican members of the State's congressional delegation (the Hastert plaintiffs); a group of Hispanic and African-American residents (the Nieves plaintiffs); a group of voters acting on behalf of the Democratic members of the State's congressional delegation (the Rosebrook plaintiffs); Democratic Representatives Cardiss Collins and Charles Hayes (the Collins plaintiffs); and the Chicago Urban League, acting on behalf of the African-American voters in the State's three majority-black congressional districts. J.S. App. 21. Several other voters and Members of Congress intervened as plaintiffs, as did the Harold Washington Party. *Hastert*, 777 F. Supp. at 639.

Because the State's existing congressional redistricting plan was clearly "unconstitutional and impracticable" following the 1990 census, the only issue before the court was what plan to draw as a remedy. *Hastert*, 777 F. Supp. at 641. In order to prevent a delay in the State's election schedule, the district court streamlined proceedings by limiting each party to presenting a single proposed redistricting plan at trial and limiting trial to two days. *Id.* at 639-640. The parties, in turn, "worked diligently during discovery and the two-day trial to resolve numerous areas of significant disagreement in their competing plans." *Id.* at 640.

c. In particular, all parties agreed "that population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Hastert*, 777 F. Supp. at 640. During the 1980's, the Hispanic population in Chicago and Cook County had grown at a rate substantially greater than the State's overall population growth rate of .0357%. Chicago's Hispanic population had increased by 29.33%, to a total of 545,852. *Id.* at 649. Thus, 19% of Chicago's 1990 population of 2,783,726 was Hispanic. Def.-Int. Exh. 26, at 4. In Cook County taken as a whole, the Hispanic population had grown by 39%, to a total of 694,194. 777 F. Supp. at 649; Def.-Int. Exh. 10.[2]

For the most part, Hispanic persons in Chicago and Cook County lived in one of "two dense enclaves, one on Chicago's near northwest side, and another on the near southwest side." *Hastert*, 777 F. Supp. at 649;

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[2] The ideal population for each of Illinois's 20 congressional districts following the 1990 census was 571,530. *Hastert*, 777 F. Supp. at 641 n.7.

see J.S. App., Att. 1. Those areas are approximately a mile from one another at their closest points, and their residents share significant political, economic, and cultural interests. *Hastert*, 777 F. Supp. at 649; Def.-Int. Exhs. 20-24. Thus, "[t]he separation of the clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. Taken together, these two areas contained sufficient Hispanic population after the 1990 census to form a voting-age majority in a congressional district. Def.-Int. Exh. 19, at 3. Under the then-existing districting plan, however, Chicago's Hispanic population had largely been divided among two majority-white districts. Def.-Int. Exh. 21, at 3-4. Because "Hispanic voters in Chicago were unlikely to be able to elect a congressional candidate of their choice without drawing a congressional map that included both the north and south Hispanic communities within the same district," Def.-Int. Exh. 29, at 3-4, the *Hastert* parties agreed that it was necessary to draw such a majority-Hispanic district.

The existing districting plan also included three Chicago-area districts with African-American majorities (Districts One, Two, and Seven). See *Hastert*, 777 F. Supp. at 646 n.19. In compliance with Seventh Circuit precedent holding retrogression in minority voting strength to be a violation of Section 2 of the Voting Rights Act, see *Ketchum* v. *Byrne*, 740 F.2d 1398, 1406 (1984), cert. denied, 471 U.S. 1135 (1985), the *Hastert* parties agreed to retain those three majority-black districts. See *Hastert*, 777 F. Supp. at 646-648 &

n.19.[3] Because of population shifts in the intervening decade, the configurations of those districts in the new plan would necessarily differ to some extent from their outlines on the 1981 map. See *id.* at 646 n.19.

Moreover, the final configuration of the three African-American-majority districts would affect the configuration chosen for the Hispanic-majority district, for the large concentrations of Hispanic population in Chicago lay in close geographic proximity to the areas included in the majority-black districts. Def.-Int. Exh. 29. The Seventh District, in particular, had represented an area running from downtown Chicago to the city's west side for two decades. See Def.-Int. Exhs. 18, 40, 41. Since 1981, its borders had extended from Lake Michigan on the east all the way to the suburbs of Oak Park, Maywood, Bellwood, and Broadview on the west. See *ibid.*; *Hastert*, 777 F. Supp. at 648 n.24. As a result, the largely Hispanic areas on the near north and south sides were separated by a portion of the Seventh District that linked downtown Chicago with the west side. See *ibid.*

The participants in the *Hastert* litigation considered several alternative configurations for the four Chicago-area majority-minority districts. See generally Def.-Int. Exhs. 25, 29. In those configurations, the majority-Hispanic district was drawn in one of three general ways. Some alternatives included a north-south Hispanic district that contained the cores of the Hispanic community and was surrounded on its eastern, southern, and western sides by the Seventh District. Def.-Int. Exhs. 25, 29F-29H; see

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[3] The 1990 census reported that 1,317,147 African-American persons lived in Cook County, 1,087,711 of them in the City of Chicago. Def.-Int. Exh. 26 at 5.

also J.S. App., Atts. 2-3. The parties rejected these alternatives, which "violated numerous communities of interest by dividing Chicago's West Side and by creating an additional southwest connector for the Seventh District." Def.-Int. Exh. 29, at 6. At least two alternatives connected the predominantly Hispanic areas by including land along Lake Michigan to their east; under these scenarios, the Seventh District was bordered on its northern, eastern, and southern sides by the majority-Hispanic district. Def.-Int. Exhs. 25, 29B-29C. The parties rejected these alternatives, because one required the creation of two narrow connectors, and the other would "violate one of Chicago's most venerable communities of interest" by dividing the "Bronzeville" area on the City's south side. Def.-Int. Exh. 29, at 4-5.

The parties ultimately decided to propose a plan "that connected the north and south side Hispanic communities through a western connector." Def.-Int. Exh. 29, at 5; see Def.-Int. Exhs. 25, 29D, 29I. Under such a map, the Seventh District would continue to extend from Lake Michigan to the western suburbs, but it would now be bounded to the west by the majority-Hispanic district's western connector. Such a plan would "preserve[] the integrity of major communities of interest on the south and west sides of Chicago and develop[] a connector that included minimal population." Def.-Int. Exh. 29, at 5. And many of the areas included in the connector would "constitute natural boundaries." *Id.* at 6. Although the other alternatives would have created "a more compact Hispanic congressional district, without causing retrogression to the three African-American districts," the participants in *Hastert* agreed to the western connector configuration in order to address

concerns raised by the Seventh District's incumbent "regarding the shape of her district." Def.-Int. Exh. 25, at 4-5.

d. Because of the extensive pretrial negotiations, the *Hastert* trial focused on consideration of two proposed redistricting plans—one offered by the Hastert plaintiffs and the other offered by the Rosebrook plaintiffs. *Hastert*, 777 F. Supp. at 640, 641 & n.8. Both plans incorporated a majority-Hispanic district using a western connector. *Id.* at 648 & nn.22, 24. Both proposals also preserved the First, Second, and Seventh Districts with African-American voting-age majorities, and they did so "in almost identical fashion." *Id.* at 646-647. In an opinion issued on November 6, 1991, the district court ordered the State to hold elections under the plan put forward by the Hastert plaintiffs. *Id.* at 662. The court found that the Hastert plan better satisfied the one-person/one-vote requirement, *id.* at 644-645, that it was "marginally superior to the Rosebrook plan" in affording minority voters an opportunity to elect the candidates of their choice, *id.* at 648, 651, and that it was "likely to produce a fair distribution of congressional seats across party lines." *Id.* at 662.

Under the plan adopted by the court, the Fourth District is 65.03% Hispanic in total population and 59.18% Hispanic in voting-age population (VAP). *Hastert*, 777 F. Supp. at 648 n.22.[4] Over 95% of its total population, and 96.9% of its Hispanic population,

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[4] The First District in the court's plan is 69.33% African-American in total population and 67.49% black in VAP. 777 F. Supp. at 647 n.21. The Second District is 68.04% African-American in total population and 65.61% black in VAP. *Ibid.* The Seventh District is 65.15% African-American in total population and 59.33% black in VAP. *Ibid.*

is located in the two core areas on the near north and south sides; the connector contains 4.3% of the district's total population and 3.1% of its Hispanic population. Def.-Int. Exh. 4, at 6. Although "[t]he Hispanic *Nieves* plaintiffs contend[ed], and all parties agree[d], that § 2 of the Voting Rights Act * * * require[d] the creation of an Hispanic district," the district's "extraordinary configuration" prevented the court from "accept[ing] this conclusion without scrutiny." 777 F. Supp. at 648. Thus, the *Hastert* court conducted its own independent review before determining that the proposed district was necessary to prevent a Section 2 violation. See *id.* at 649-651.

Applying the test set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the court first found that "the Chicago/Cook County Hispanic community is 'sufficiently large and geographically compact' to constitute a single district majority." *Hastert*, 777 F. Supp. at 649 (quoting *Gingles*, 478 U.S. at 50). It also found that "the Chicago/Cook County Hispanic community clearly is politically cohesive" and that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." 777 F. Supp. at 650. In making these findings, the court relied on "previous adjudications that found the community politically cohesive" and "[p]revious judicial findings demonstrating a paucity of Hispanic officials in city and state-wide elected political offices." *Ibid.* The court also noted that ecological regression analyses conducted by two expert witnesses had demonstrated significant polarized voting in Chicago along ethnic lines. *Ibid.* Having thus found the three *Gingles* preconditions satisfied, the *Hastert* court went on to find that the failure to draw a district with an Hispanic majority would violate Section 2 under the "totality of

circumstances." *Hastert*, 777 F. Supp. at 650. In this regard, it relied principally on the "judicially recognized history of discrimination, both past and recent, against the Chicago Hispanic community and its attendant impact on effective political participation and representation." *Ibid.*

3. Appellant, James R. King, is a resident of the Fourth District. J.S. App. 6. He filed the instant action in February of 1995. *Ibid.* His complaint alleged that the Fourth District, as adopted by the *Hastert* court, violated the Fourteenth Amendment standards of *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*). J.S. App. 6-7. After a three-judge district court was convened, J.S. App. 11-12, King filed a motion on August 15, 1995, for a preliminary injunction to prevent the State from holding the 1996 congressional elections under the court-ordered plan. The court permitted several parties to intervene as defendants.[5] It then consolidated the hearing on King's motion for preliminary injunction with trial on the merits of the action. J.S. App. 8; see Fed. R. Civ. P. 65(a)(2).

On March 7, 1996, the three-judge court issued a memorandum and order denying King's requests for preliminary and permanent injunctive relief. J.S. App. 5-71. The court first addressed several procedural issues involving the relationship between King's action and the *Hastert* court decree. J.S. App. 8. It recognized that neither the *Hastert* court's findings of fact nor its judgment could have any issue- or

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[5] Intervenors were several parties who had participated in *Hastert* (District One's incumbent Representative Bobby Rush, Al Johnson, Naomi Hernandez, and the Chicago Urban League) and some who had not (Timuel Black, Elvira Carrizales, and the United States). J.S. App. 7 & n.4.

claim-preclusive effect on King, who was not a party to the earlier action. J.S. App. 14. The district court did admit into evidence the *Hastert* court's findings of fact, and it accepted those findings in the absence of a showing of clear error or changed factual circumstances. J.S. App. 15-19. But the court did not limit King to the record developed by the parties in *Hastert*; indeed, the court did not even admit portions of the *Hastert* record as substantive evidence unless the parties in the instant action moved for the admission of a particular exhibit. J.S. App. 19. The district court also determined that the law of the case doctrine prevented it from disturbing the *Hastert* court's legal conclusions absent manifest error or an arguable change in decisional law. J.S. App. 20. Because both *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), and *Shaw I* arguably changed the law, however, the court reviewed *de novo* the *Hastert* court's conclusion "that the district's extraordinary configuration was necessary to 'satisfy constitutional principles.'" J.S. App. 31.

On the merits, the district court held that a court-ordered redistricting plan must be held to at least as stringent a standard as this Court applied in *Miller* to legislatively drawn plans. J.S. App. 39-46. Applying *Miller*'s test, the court held that strict scrutiny was warranted because "the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District." J.S. App. 50. The court shifted the burden to the State to prove that the district was narrowly tailored to serve a compelling interest. J.S. App. 37-39 & n.36.

The district court found that defendants had carried their burden. The court concluded that drawing a majority-Hispanic district in Cook County was necessary to prevent a violation of Section 2. J.S. App. 58-68. The court held that the Hispanic community "was sufficiently numerous to constitute a majority in a properly drawn district," J.S. App. 62, and therefore that "the *Hastert* court's finding of geographic compactness was appropriate," J.S. App. 64. The court also found that the Chicago Hispanic community was politically cohesive and that the district drawn by the *Hastert* court has "protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate." J.S. App. 67. The court finally found that the Fourth District, as drawn, was narrowly tailored to the interest in avoiding a Section 2 violation. J.S. App. 68-70. It noted that the *Hastert* court had "subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation." J.S. App. 69-70. District Four did not contain an unnecessarily large Hispanic population, and its "extraordinary configuration" was necessary to "preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression" that would violate the Voting Rights Act. J.S. App. 70.

ARGUMENT

The district court applied strict scrutiny to District Four and properly found that drawing a majority-Hispanic district in Chicago and Cook County was necessary to prevent a violation of Sec-

tion 2 of the Voting Rights Act. In reaching that conclusion, the district court did not merely reaffirm the *Hastert* court's explicit findings on the Section 2 preconditions and the totality of circumstances. It also engaged in its own analysis of the record and found that the *Hastert* court's determinations had only been confirmed by more recent evidence.

The court also correctly found that District Four properly addressed the Section 2 violation, and that its configuration was necessary to serve that compelling interest while at the same time protecting communities of interest and complying with the Voting Rights Act's requirement to assure African-American voters an equal opportunity to elect the representatives of their choice.

In our view, those conclusions are correct, they are amply supported by the facts of this case, and they are sufficient to establish the constitutionality of District Four. Nonetheless, at the time the district court reached its decision, it did not have the benefit of this Court's decisions in *Bush* v. *Vera*, 116 S. Ct. 1941 (1996), and *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), both of which addressed the application of strict scrutiny to districts whose configuration subordinates traditional districting criteria to the use of race. Accordingly, it would be appropriate to remand this case so that the district court may in the first instance address the application of this Court's decisions in *Bush* and *Shaw II* to the facts of this case.

1. Although "[s]trict scrutiny remains, nonetheless, strict," *Bush*, 116 S. Ct. at 1961 (plurality opinion), this Court has rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097,

2117 (1995). A district will satisfy strict scrutiny where it is narrowly tailored to serve a compelling state interest. See *Bush*, 116 S. Ct. at 1960 (plurality opinion); *Shaw II*, 116 S. Ct. at 1902; *Miller* v. *Johnson*, 115 S. Ct. 2475, 2490 (1995). Here, the district court found that the Fourth District served the compelling interest in avoiding a violation of Section 2. J.S. App. 58-68; see *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring).[6]

a. The inquiry into the existence of a compelling state interest requires a determination of whether there is "a strong basis in evidence for concluding that the *Gingles* factors are present." *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring); see *Shaw II*, 116 S. Ct. at 1903; *Miller*, 115 S. Ct. at 2491. Here, the district court did not find merely a strong basis in evidence. The court found that a majority-Hispanic district was necessary to prevent an actual, proven violation of Section 2. The district court noted that the *Hastert* court had examined each of the three *Gingles* preconditions as well as the totality of the circumstances and found that the failure to draw a district in Cook County with an Hispanic majority would unlawfully dilute Hispanic voting strength. J.S. App. 58-68.

The court did not rely only on the *Hastert* findings, however. It also conducted its own review of the evidence relating to the *Gingles* preconditions. It found that the Hispanic population in the Chicago area was

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[6] Appellant asserts that the district court placed the burden of establishing the lack of a compelling interest on the plaintiff. J.S. 10-11. To the contrary, the court held quite explicitly that "once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified." J.S. App. 37; see also J.S. App. 37 n.36.

sufficiently large and compact "to constitute a majority in a properly drawn district." J.S. App. 61-62, 64; see also J.S. App. 52 n.48. It also found that Chicago's Hispanic community was politically cohesive, and that appellant's contrary evidence "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw." J.S. App. 62. Finally, the court found that "ecological regression analysis and extreme case performance of forty-one elections held between 1983 and 1995 establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." J.S. App. 63. Thus, "the problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain." J.S. App. 63-64.[7] These findings are fully sufficient to establish the *Gingles* preconditions, particularly because the failure to draw a majority-Hispanic district would leave members of the sizeable Hispanic population without a meaningful opportunity to elect the candidate of their choice in a *single* congressional district. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658 (1994).

b. Appellant challenges the district court's findings on the first *Gingles* precondition, contending that the Hispanic population in Chicago and Cook County is not geographically compact. He argues that "where the 4th CD is not compact, it is clear error to find that its population is geographically compact." J.S. 29. That is incorrect. "The first *Gingles* condition refers to the compactness of the minority

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[7] See also Def.-Int. Exh. 5 at 14 ("During the 1980's and 1990's in Chicago, Hispanics have not been elected to office in a legislative or judicial district lacking a voting-age majority of Hispanics.").

population, not to the compactness of the contested district." *Bush*, 116 S. Ct. at 1971 (Kennedy, J., concurring); see *Gingles*, 478 U.S. at 50. Cook County's Hispanic population is concentrated in two dense enclaves located a mile from each other at their closest points. The population in those areas is sufficient to form a voting-age majority in a reasonably drawn congressional district. See pp. 5-6, *supra*. The *Gingles* "compactness" test is therefore satisfied.

Appellant nonetheless contends that Hispanics are not sufficiently numerous to constitute a majority of voting-age *citizens* in a congressional district. J.S. 26-28. Appellant points only to the testimony of his own witness, who stated that District Four, as drawn, had an Hispanic citizen voting-age population of no more than 45%. This Court has explicitly reserved the question of "which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy." *DeGrandy*, 114 S. Ct. at 2656. The district court properly declined to resolve that question here, for appellant did not "establish[] via competent evidence that the Hispanic citizen voting age population falls below fifty percent" in District Four. J.S. App. 61. The court found "simply too many uncertainties surrounding the validity of the data" reported by appellant's witness. J.S. App. 61 n.58.[8] That find-

[8] Citizenship data were not available at the time of redistricting. J.S. App. 61 n.58. Moreover, the Census Bureau reports citizenship data only at the census block group level, not at the smaller census block level at which the district lines were drawn. Thus, appellant's estimate of the Hispanic citizen population in District Four may not properly account for variations in citizenship levels among different blocks. *Ibid.*

ing is not clearly erroneous. Indeed, the 1992 and 1994 congressional election results support the conclusion that Hispanic voters in District Four possess "the potential to elect a representative of [their] choice"—the focus of the first *Gingles* precondition. J.S. App. 58 (quoting *Growe* v. *Emison*, 507 U.S. 25, 40 (1993)); see *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (reasonably compact districts containing 44% and 45.6% African-American population demonstrate that African-Americans are sufficiently numerous to satisfy first *Gingles* precondition).

2. Appellant contends that District Four is not narrowly tailored to the interest in complying with Section 2. J.S. 12-18. This Court did not squarely address the standards governing the application of the narrow tailoring inquiry in the context of a Section 2 justification until its decisions in *Shaw II* and *Bush*, both of which were rendered after the district court's decision here. See J.S. App. 68-69 (noting some uncertainty in the narrow tailoring standard to be applied).

In *Shaw II* and *Bush*, this Court established at least two requirements for demonstrating that a district is narrowly tailored to the compelling interest in avoiding a Section 2 violation. First, the district must "substantially address[] the § 2 violation." *Shaw II*, 116 S. Ct. at 1907. Second, "the district

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Appellant's witness's precinct-by-precinct citizenship estimate also generated some anomalies; these anomalies cast further doubt on his data. In 605 precincts, appellant's witness estimated that the Hispanic citizen voting-age population was *larger* than the Hispanic voting-age population. See Tr. 273-274; Def.-Int. Exh. 51. And appellant's citizenship estimate did not take account of increases in the Hispanic citizen population in the Fourth District since 1990 due to naturalization and the amnesty program. J.S. App. 61 n.58.

drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Bush*, 116 S. Ct. at 1961 (plurality opinion).

In our view, the evidence in this case showed that both of those criteria were satisfied. District Four "substantially addresses the § 2 violation" because it includes the core areas of Hispanic population in the City of Chicago; it is the dilution of that Hispanic community's opportunity to elect candidates of its choice that would be the basis for any finding of Section 2 liability. Moreover, District Four's configuration does "not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." The district's configuration is attributable to a combination of "predominantly nonracial, political manipulation," *Bush*, 116 S. Ct. at 1962—the need to "preserve shared communities of interest" and historical configurations in surrounding districts, J.S. App. 70, and the State's independent compelling interest in "remedy[ing] established violations of the Voting Rights Act" with respect to surrounding African-Americans, J.S. App. 70. Compare *Bush*, 116 S. Ct. at 1972 (Kennedy, J., concurring). Insofar as race was used, therefore, it was used no more than reasonably necessary to comply with the dictates of Section 2.

In approaching those issues, see J.S. App. 69-70, however, the district court did not have the benefit of this Court's result and rationale in either *Bush* or *Shaw II*. Accordingly, it would be appropriate to remand this case to the district court so that that court, in the first instance, may apply the teachings of *Bush* and *Shaw II* to the facts of this case. On remand, the district court could, if it deemed it neces-

sary or desirable, take additional evidence regarding the application of the *Bush* and *Shaw II* narrow-tailoring standards to this case.

3. Appellant contends that the district court denied him his "day in court" (J.S. 9) by treating him as bound by the findings in *Hastert*. J.S. 5-11. That is incorrect. The district court explicitly recognized that the *Hastert* findings had no issue- or claim-preclusive effect on appellant. J.S. App. 14. His action therefore was not barred as an "impermissible collateral attack." Cf. *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989).

The district court properly recognized, however, that the *Hastert* proceedings are not irrelevant to appellant's action—indeed, they are of central importance to it. The only action of the State of Illinois challenged by appellant is its implementation of the districting plan ordered into effect by the *Hastert* court. Thus, this "lawsuit is at its very core a challenge to the *Hastert* court's order." J.S. App. 17. In these circumstances, the district court quite correctly admitted into evidence both the *Hastert* court's findings and the record on which those findings were based. To determine whether the *Hastert* court's plan reflected a predominantly racial motivation, and if so whether the Fourth District's configuration was justified by Section 2, it was necessary to consider that court's actual purposes and the evidence before it at the time. See *Shaw II*, 116 S. Ct. at 1902 n.4, 1903; cf. *United States* v. *Virginia*, 116 S. Ct. 2264, 2277 (1996).

But the district court did not limit appellant to the record established in *Hastert*, nor did it treat the *Hastert* court's findings as conclusive. Although the court stated that it would accept the *Hastert* findings

in the absence of a showing of clear error or changed circumstances, appellant does not point to a single finding below that was affected by this standard of review. To the contrary, the district court carefully considered the evidence adduced by appellant and in many cases found it wanting in terms that would disentitle him to relief under any standard.[9] And while the district court stated that the law of the case doctrine provided the appropriate standard for reviewing the *Hastert* court's legal conclusions, it reviewed *de novo* the basic conclusion that District Four was necessary to satisfy constitutional principles because *Shaw I* and *Miller* changed the law. J.S. App. 31.

Appellant points (J.S. 5) to the district court's discussion of the "*Hastert* court's discretion in selecting an appropriate remedy." J.S. App. 69 (citing *United States* v. *Paradise*, 480 U.S. 149, 183-185 (1987)). That discussion did not deprive appellant of anything to which he was legally entitled. Even if appellant had been a party in *Hastert* and had appealed its final judgment, some deference to the district court's remedial discretion would be warranted. See *Paradise*, 480 U.S. at 183-185. The fact that appellant did not participate in the earlier litigation does not mean that the *Hastert* court was any less empowered to exercise its full remedial authority in discharging its "unwelcome obligation" (*Connor* v. *Finch*, 431 U.S. 407, 414

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[9] See J.S. App. 61 (Appellant presented no "competent evidence" on the citizenship issue); J.S. App. 62 (Appellant's evidence on lack of political cohesion "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw"); J.S. App. 62-63 (on racial bloc voting, "[n]either proposition advanced by [Appellant] is supported by recent city-wide election results or meaningful statistical analysis").

(1977))—the drawing of a constitutional districting plan after the state legislature defaulted on its responsibility to do so.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for further proceedings in light of *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996), and *Bush* v. *Vera*, 116 S. Ct. 1941 (1996).

Respectfully submitted.

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OCTOBER 1996